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Publication Review

Fiduciary Duties: Directors and Employees (second edition)

Andrew Stafford QC and Stuart Ritchie QC

Reviewed by Remus Valsan

*Fiduciary Duties: Directors and Employees* by Andrew Stafford QC and Stuart Ritchie QC is an in-depth, comparative analysis of fiduciary duties owed by directors and employees under English law. Although the book focuses on fiduciary duties, it also covers the main contractual rights and remedies which may apply when a director or employee engages in misconduct. A large volume of caselaw and academic commentary on fiduciary duties has been produced since 2008, when the first edition was published. The new edition does a remarkable job in incorporating the most relevant legal developments and academic commentary on fiduciary duties. Most chapters comprise references to caselaw from across the Commonwealth, particularly from Australia and New Zealand, which, like English law, prefer a restrictive approach to fiduciary duties. The authors are careful in their use of the case law of other common law countries to inform their own critical evaluation of the English law. They highlight the areas where there are important differences between English and foreign (particularly Australian) law.

The integrated evaluation of the legal regime of fiduciary duties of directors and employees from both a theoretical and a practical perspective is one of the essential contributions that this book brings to fiduciary law. Analysing the two areas of fiduciary law side by side is a challenging task. Director-company is recognised throughout the Commonwealth as a status fiduciary relation, where fiduciary duties are almost inevitable. In contrast, employee-employer is generally viewed as an arms' length contractual relation, where fiduciary duties arise only exceptionally, on an ad hoc basis. The comparison of these two relations focuses the analysis on the fundamental principles of fiduciary law. Stafford and Ritchie's evaluation of these principles is, for the most part, very illuminating. For instance, their comparative approach shows why reliance on overly used formulas such as

loyalty or trust and confidence, without a further explanation of their meaning, perpetuates the confusion prevailing in this area of law. These concepts have a specific meaning in employment law that is not coterminous with their meaning in fiduciary theory.

The comparison is also enlightening in its treatment of the grey area between the two strands of fiduciary law. Difficult questions have arisen in English law as regards the applicability by analogy of directors' duties to executive directors, officers and other senior employees. This particular connexion has not been sufficiently explored in English law, and the book fills this gap.

Stafford and Ritchie's analysis is particularly rigorous and insightful in setting the boundaries between the fiduciary principle and related doctrines and duties. The authors acknowledge that the boundary between contractual and fiduciary liability is uncertain, but are careful to keep the fiduciary principle distinct from other bodies of law, most notably law of negligence and contract law (fair dealing issues in employment settings). They also rightfully keep fiduciary duties separate from obligations of confidentiality and the doctrine of undue influence.

The authors favour a restrictive approach to the fiduciary principle in both its scope and content. In analysing the incidence of the fiduciary principle, the authors correctly observe that simply entrusting someone with a job to perform or someone's undertaking to act for another does not make that person a fiduciary. They cite multiple British and Australian authorities, including the recent Australian decision in *Grimaldi v Chameleon Mining Corp & Others*,<sup>1</sup> in support of the proposition that the core element that generates fiduciary duties is the reasonable expectations of one party that the other party will act exclusively in the former's interests. Their conclusion on when fiduciary duties arise, however, is rather vague and lacks explanatory power. In their view, what distinguishes a fiduciary relation from an arms' length commercial relation is the requirement for a party not to exploit the relationship for his own benefit and to be financially disinterested in the performance of his duties.

In line with the traditional English and Australian approach, and in contrast to the North-American view, Stafford and Ritchie support the proscriptive view of fiduciary duties, which restricts the fiduciary label to the no-conflict and no-profit duties. This view is supported by perceptive explanations of why certain duties that often bind fiduciaries are not properly regarded as fiduciary duties. The duty of good faith is a telling example. Following

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<sup>1</sup> [2012] 287 ALR 22.

Millet LJ's statements in *Bristol & West Building Society v Mothew*,<sup>2</sup> where he listed good faith as a facet of the core obligation of loyalty, the duty of good faith is often regarded as fiduciary. The authors reject the broader approach, espoused especially by Canadian courts, but also by several English courts, that there is a prescriptive fiduciary duty of good faith. Good faith, although present in all fiduciary relations, is not a concept limited to them. The same applies to the duty to act within powers, which is not a peculiarly fiduciary duty. It is binding on any holder of a limited power.

The analysis of disclosure obligations is very insightful and brings much needed clarification in this area of fiduciary law. The authors point out that there is a trend towards imposing obligations of disclosure on directors and employees. They review the different contexts in which disclosure obligations arise for directors and employees and the functions that these obligations have. They bring strong arguments against the fiduciary duty of disclosure imposed on directors in *Item Software (UK) Limited v Fassihi*<sup>3</sup> and argue against an analogous duty for employees.

While the authors bring convincing arguments in favour of a narrow approach to fiduciary duties, their definition of this concept, it is submitted, is too restrictive. Their understanding that fiduciary duties are limited to the principle of denial of self-interest led them to maintain that the duty comprised in s.172 of Companies Act 2006 is not a fiduciary duty. They seem to endorse the view that this duty is an exceptional duty of care that can exist outside fiduciary relations, has no direct relation to self-interest, and cannot be transplanted into a different fiduciary relationship.<sup>4</sup> This view is contestable. Besides the fact that s.172 is widely considered to state the core fiduciary duty of directors,<sup>5</sup> a similar duty exists for trustees and other fiduciaries. The duty to take into account relevant considerations and to ignore irrelevant ones while exercising discretion is not restricted to company directors. It is a fundamental duty that governs the exercise of discretion by all fiduciaries.<sup>6</sup> The Court of Appeal has recently recognised that in *Pitt v Holt*,<sup>7</sup> where the Lloyd LJ stated

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<sup>2</sup> [1996] 4 All ER 698.

<sup>3</sup> [2004] IRLR 928.

<sup>4</sup> Para. 2.59.

<sup>5</sup> The authors acknowledge this at para. 2.150.

<sup>6</sup> See Geraint Thomas, *Thomas on Powers*, 2nd ed. (Oxford: Oxford University Press, 2012) 555-558.

<sup>7</sup> *Pitt and another v Holt and another; Futter and another v Futter and others* [2011] 2 All ER 450 at 487. The Supreme Court upheld this decision as regards the matter of actions by trustees within the limits of their powers. *Futter & Anor v The Commissioners for Her*

that the trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. The two components of fiduciary duties, namely the proscriptive duties and the duty to exercise discretion based on relevant matters are intimately connected. Recent research in fiduciary law theory shows that in relations where one party has discretionary power or authority over the other's interests, the strict proscriptive duties are necessary to ensure that the exercise of discretion is not influenced, directly or subconsciously, by the prospect of self-interest.<sup>8</sup>

*Fiduciary Duties: Directors and Employees* successfully balances an in-depth evaluation of core fiduciary law doctrinal debates with details relevant to practitioners who seek answers to concrete legal problems. The authors adopt a critical approach rather than a textbook exposition of the law. They state and explain their own view where the law is confusing or open to doubt. Their critical evaluation provide valuable insights for the further development of fiduciary law.

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*Majesty's Revenue and Customs and Pitt & Anor v Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26.

<sup>8</sup> See Remus Valsan, "Understanding Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law" (2012) McGill University Faculty of Law Doctoral Dissertation at 180-194.